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CRUELTY DIVORCE UNDER NEW YORK'S REFORM ACT: ON REPEATING ANCIENT ERROR

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INTRODUCTION

The New York Divorce Reform Act of 1966[1] was the tardy child of enormous political, social and professional pressure brought to bear on a legal scheme widely thought iniquitous both in policy and in consequence. Although the legislature authorized dissolution divorce as early as 1787,[2] adultery was the sole ground available then, and for the next 180 years. For more than 120 of those years, the legislature staunchly repelled concerted efforts to broaden the scope of marital relief.[3] Finally, the evils generated by that law had become so patent that the armies of the press, most religious groups, the bar, and the citizenry joined forces to compel reform. It is a tribute to their collective strength that, when Armageddon arrived, the opposing force had seemingly disappeared; only seven votes in the assembly and one in the senate were cast against the Reform Act.[4]

The resulting scheme has been discussed in detail elsewhere;[5] it is enough for the moment to recall summarily that absolute divorce may now be granted for any of six causes: (1) cruel and inhuman treatment;[6] (2) abandonment for two or more years;[7] (3) confinement in prison for three or more consecutive years;[8] (4) adultery;[9]

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1. Ch. 254 [1966] Laws of New York 265.
2. Law of March 30, 1787, ch. 69 [1787] Laws of New York 93.
3. For a brief but helpful summary of efforts at reform in New York, see M. RHEINSTEIN, MARITAL STABILITY, DIVORCE, AND THE LAW 38-48 (1972) [hereinafter cited as RHEINSTEIN].
4. *Id.* at 356.
5. *E.g.*, H. FOSTER & D. FREED, THE DIVORCE REFORM LAW (1966).
6. N.Y. DOM. REL. LAW § 170(1) (McKinney Supp. 1972).
7. *Id.* § 170(2).
8. *Id.* § 170(3).
9. *Id.* § 170(4).

(5) living apart for one year pursuant to a judicial separation decree;[10] or (6) living apart for at least one year after and pursuant to a written separation agreement or memorandum executed according to certain formal requirements.[11] As sweeping as these changes seem, however, it is apparent that reform does not imply revolution. The Act continues the fundamental assumption that marital relationships are of real concern to the state and, concomitantly, that their dissolution may be ordered only under defined conditions. Presumably, the legislature concluded that its new formulation appropriately expressed the state's interest in marriage by allowing divorce in those situations where—for a variety of reasons—the social costs of denying marital relief outweigh the benefits thought to accompany marital stability.

On the other hand, the Act's success, whether as a "liberal breakthrough"[12] or as a strategic retreat for conservatism, depends not upon its political acceptability but rather upon its capacity to guide the ordering of social relationships in principle and in practice. Legislative reform was prompted in part by a conviction that the traditional social policy prohibiting marital dissolution save for adultery was now undesirable and in part by revulsion at a set of illegal practices spawned by existing law which designedly and systematically undercut any notion of public policy. With these evils as a focus, the following discussion will raise certain questions concerning the interpretation of the Reform Act. Most particularly, attention will be directed to the meaning of "cruel and inhuman treatment," in the belief that the success of the reform depends in a large measure upon the operation of this ground for divorce. Abandonment requires the lapse of a two-year period, and penal confinement justifies divorce only after incarceration for three consecutive years. Divorce subsequent to judicial separation depends upon having grounds for separation in the first instance,[13] on successful completion of that action, and on passage of one year from the entry of a decree. Finally, divorce

10. *Id.* § 170(5). Until September 1, 1972, the minimum period of living separate and apart following the decree was two years.

11. *Id.* § 170(6). As with § 170(5), the minimum period of separation for divorce purposes was, until September 1, 1972, two years from execution of the agreement.

12. RHEINSTEIN at 352 *et seq.*

13. Judicial separation may be granted for the following causes: cruel and inhuman treatment, abandonment, neglect of wife, adultery, and confinement in prison for three or more consecutive years. N.Y. DOM. REL. LAW § 200 (McKinney Supp. 1972).

pursuant to a separation agreement usually involves a more or less protracted period of negotiation, followed by a one-year waiting period. It seems fair to assume that in none of these cases can an absolute divorce regularly be obtained in less than a year and a half from the time when matters have, in the parties' view at least, become insupportable. Consequently, given the variety of personal, emotional and extrinsic factors that often make substantial delay undesirable, it was to be expected, and apparently has become the case,[14] that those seeking relief rely heavily on the cruelty ground. To the extent that this category accurately marks the point of accommodation between the continuing state interest in marital stability and the social pressures that led to the Reform Act, there will exist a social policy which can be implemented. To the extent that it fails to strike this balance, there is reason to expect the replication of an unfortunate history.

I. Divorce Law and Practice Under the Ancien Regime

The history of Anglo-American divorce, upon which the New York experience draws heavily, began with ecclesiastical courts which never granted a divorce in the modern sense. Decrees of divorce *a vinculo matrimonii* absolutely severing the martial relationship were available, but this remedy was reserved for pre-existing impediments (*e.g.*, impotence, consanguinity, or affinity) of the kind now justifying annulment. It was not appropriate where the martial difficulty arose from post-nuptial causes, and even adulterous behavior would not justify divorce *a vinculo* in the ecclesiastical courts. As Blackstone explains it,

> [W]ith us in England adultery is only a cause of separation from bed and board: for . . . if divorces are allowed to depend upon a matter within the power of either of the parties, they would probably be extremely frequent . . . .[15]

14. In Erie County during the first four months of 1973, over 50 percent of all uncontested divorce decrees were granted on the ground of cruel and inhuman treatment. See Table II accompanying note 179 *infra*.

15. 2 W. Blackstone, Commentaries *441. It is true that divorces *a vinculo matrimonii* were sometimes granted by Parliament, indeed, "frequently," according to Blackstone. *Id.* Frequency here is, however, a relative notion; to obtain a Parliamentary divorce by private bill involved considerable expenditure of time and money. *See* Rheinstein at 24.

Divorce from bed and board—*a mensa et thoro*—was, then, the exclusive remedy for post-marital misconduct. It provided a limited form of relief; to be exact, divorce *a mensa*—or judicial separation, as it is now called—relieved the plaintiff spouse from the duty of cohabitation with his or her tormentor. The marriage continued to exist, with none of the economic incidents terminated, at least if the wife were the complainant. Most important, the spouses were not free to remarry in view of the continuance of their vows.

In New York State prior to 1967, judicial separation remained the only available form of relief for post-martial cause other than adultery. As has already been suggested, this system was generally thought both wrong in policy and pernicious in consequence. Without recapitulating a lengthy and variegated debate, several sources of dissatisfaction should be mentioned briefly. One relates to the social policy concerning marital relationships implicit in former law, and to its direct consequences. Requiring that parties remain married except in cases of infidelity was seen as a "medieval" and "absurd" anachronism,[16] which simplistically equated marital breakdown with divorce.[17] By 1966 the balance of public opinion, always excepting the official Roman Catholic position, had come to consider that the social costs of restrictive martimonial laws heavily outweighed whatever marginal social benefit might accrue from marital stability. In particular, the formal insistence that parties to an unbearable social relationship remain forever bound, without opportunity for relief and the creation of happier circumstances, seemed an intolerable price to demand.[18]

It was well known, moreover, that these rules did not in reality apply to all people, and that the formal law had spawned a set of practices inconsistent with any notions of sound social policy. As in other states where intolerable marital relations did not begin to meet the requirements even for limited relief,[19] a panoply of local devices

16. Special Committee Report on Matrimonial Law, *Statement of Howard Hilton Spellman, Chairman, Before the New York State Joint Legislative Committee on Matrimonial and Family Law,* 21 RECORD OF N.Y.C.B.A. 35 (1966) [hereinafter cited as Committee Report].

17. *See* Rheinstein, *Divorce and the Law in Germany: A Review,* 65 AM. J. SOC. 489 (1960), for a discussion of the difference between "marital breakdown" and divorce.

18. Committee Report at 38.

19. *See, e.g.,* Fox v. Fox, 17 Misc. 2d 998, 1001, 186 N.Y.S.2d 542, 545 (Sup. Ct. 1958).

for mitigating the formal law arose. Most of these devices were judicially administered, principally by trial courts but sometimes at the appellate level as well. For the wealthy, there was frequent recourse to migratory divorce. So long as both parties participated in a sister state proceeding there was, of course, little to be done by New York; the requirements of full faith and credit compelled acceptance of that determination for most purposes.[20] In *ex parte* proceedings, where jurisdictional challenge to a sister state decree is permissible,[21] there is some reason to believe that New York courts were readier than most to uphold this evasionary technique. An unusually broad notion of estoppel developed, barring the left-at-home spouse from showing the absence of jurisdictional facts in the rendering forum.[22] As a result, a considerable number of defective sister state divorces were sustained without need for inquiry into the jurisdictional claims upon which they rested.[23]

The really distinctive contribution of New York courts, however, lies in the extension of comity to foreign—and particularly to Mexican—decrees. That the State of Chihuahua operated a profitable and convenient divorce mill was long and widely known; yet, peculiarly, the issue of the validity of bilateral Chihuahua dissolutions did not come before the court of appeals until 1965.[24] Then, the court considered the validity of two classic Mexican divorces, with jurisdiction based in one instance on purely formal registration in the municipal register,[25] and in the other, on submission to jurisdiction through personal appearance.[26] Despite the history of repeated legislative re-

20. Johnson v. Muelberger, 340 U.S. 581 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1948).

21. Williams v. North Carolina, 325 U.S. 226 (1945); Williams v. North Carolina, 317 U.S. 287 (1942).

22. *E.g.*, Krause v. Krause, 282 N.Y. 355, 26 N.E.2d 290 (1940).

23. *See* RHEINSTEIN at 90; Harper, *The Myth of the Void Divorce*, 2 LAW & CONTEMP. PROB. 335 (1935). Moreover, the estoppel doctrine apparently has not been the two-edged sword that one might fear. In Landsman v. Landsman, 302 N.Y. 45, 96 N.E.2d 81 (1950), the court of appeals refused to bar a second husband from seeking annulment of a marriage contracted when his wife was still married to her first husband, despite the fact that he knew of the impediment at all times. *Landsman* has been viewed as inconsistent in principle with the cases applying estoppel in migratory divorce situations (with the suggestion that the latter be reconsidered). Note, *The Landsman Decision: A Foothold in the Quagmire of New York Divorce Law*, 51 COLUM. L. REV. 388 (1951). It will be noted by the cynical that the results, in terms of marital status, are really quite consistent.

24. Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 790, 262 N.Y.S.2d 86 (1965).

25. *Id.* at 70, 209 N.E.2d at 710, 262 N.Y.S.2d at 87.

26. *Id.* at 74, 209 N.E.2d at 713, 262 N.Y.S.2d at 91.

fusal to modify the domestic divorce law, the court of appeals found no local public policy so strong as to require denial of comity to either decree. To an extent, the court felt itself without decent choice, in view of the vast number of Mexican divorces recognized by lower courts and relied on by the citizenry in past years.[27] But, as Chief Judge Desmond observed, rejection of Mexican divorces could have been made prospectively only, without either denying New York's apparent public policy for the future or injuring those who had previously relied on Mexican decrees.[28] The majority also argued that, since it must recognize bilateral Nevada divorces often based on no more than six weeks residence coupled with fraudulent representations of domiciliary intent, there was no reason to discriminate against products of the Mexican procedure.[29] With respect, this proposition is also far from compelling. There is no logic in inviting a type of evil that need not be suffered because one must tolerate an evil that cannot be avoided. At base, the court of appeals decision is comprehensible only as a rejection of existing legislative divorce policy because it no longer accorded with law in action.[30]

On the home front, several further ameliorative doctrines and practices developed, two of which deserve special mention. A line of authority arose that allowed annulment for misrepresentation of "material" facts,[31] rather than insisting—as most courts have[32]—that the fraud go to the "essentials" of the marital relation. Broadly speaking, a decree of nullity was available for fraud sufficient to authorize the cancellation of any commercial contract.[33] It would generally suffice that the fact misrepresented was important to the party seeking relief in the sense that, but for the misrepresentation, the marriage would not have occurred. Of course, a certain nexus between the fraud and the marital relationship was required but, by and large, considerable scope for findings of fraud existed. It is useful to con-

27. *Id.* at 71, 209 N.E.2d at 710-11, 262 N.Y.S.2d at 88.
28. *Id.* at 78, 209 N.E.2d at 715, 262 N.Y.S.2d at 95.
29. *Id.* at 73, 209 N.E.2d at 712, 262 N.Y.S.2d at 90.
30. RHEINSTEIN at 91.
31. The leading case is Di Lorenzo v. Di Lorenzo, 174 N.Y. 467, 67 N.E. 63, 75 N.Y.S. 878 (1903), holding that marriage is in its inception an ordinary civil contract, and applying the general rule permitting avoidance of an agreement where an intentional misrepresentation of material fact has been relied on by the party seeking relief.
32. *E.g.*, Wells v. Talham, 180 Wis. 654, 194 N.W. 36 (1923).
33. Di Lorenzo v. Di Lorenzo, 174 N.Y. 467, 472, 67 N.E. 63, 64, 75 N.Y.S. 878, 879 (1903).

trast with this view the requirement of most other states that the fraud bear directly on those relatively few rights and obligations attached by law to the marriage relationship (the "essentials" of marriage),[34] and to the even stricter requirements of English law.[35]

The great significance of "liberal" annulment principles, of course, lies more in the latitude given trial judges than in doctrinal terms. Indeed, New York annulment practice closely approximated divorce practice in many other jurisdictions. For example, the reported cases evinced considerable and, over time, increasing discrimination in deciding whether there was a deliberate misrepresentation or culpable concealment of a material "fact."[36] A *Columbia Law Review* survey of all nullity actions based on fraud for which opinions were published in New York between 1943 and 1947 revealed that more than two-thirds of the appellate decisions—103 of 142 cases—were decided against the plaintiff.[37] At the same time, it is clear that trial courts were generally far less inquisitive. Over the same five-year period, it appears that almost 25,000 annulments were granted often for fraud.[38]

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34. *E.g.,* Reynolds v. Reynolds, 85 Mass. (3 Allen) 605 (1862). Chipman v. Johnston, 237 Mass. 502, 130 N.E. 65 (1921) presented striking facts. Here, the husband intentionally deceived his fiancee as to every circumstance concerning himself: his name, residence, family, financial condition, property, and the like. He was, in short, a shade without substance so far as his wife was concerned. Shortly after their marriage, the mysterious husband disappeared, and, when his misrepresentation came to light, Mrs. Reynolds sought an annulment. That relief was denied, however, since it did not appear that the husband had impersonated some other real person, nor did the wife mistake him for such other person.

35. For a considerable period, there was no annulment for fraud, by itself, in England. The leading case denied an annulment where the husband alleged fraudulent concealment of pregnancy *per alium* on the following ground: "[I]n every case where fraud had been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent . . . . But when there is consent no fraud inducing that consent is material." Moss v. Moss, [1897] P. 263, 269. This position has been somewhat eased by the Matrimonial Causes Acts of 1937 and 1965.

36. *See, e.g.,* Woronzoff-Daschkoff v. Woronzoff-Daschkoff, 303 N.Y. 506, 104 N.E.2d 877 (1952), where the court of appeals reversed an annulment granted because the husband had misrepresented facts and intention concerning marriage for money. There is, indeed, a suggestion in Judge Desmond's opinion for the court that return to the "essentials of the marriage" standard for fraud might be desirable. *Id.* at 511, 104 N.E.2d at 880.

37. Note, *Annulments for Fraud—New York's Answer to Reno?,* 48 COLUM. L. REV. 900, 905 (1948).

38. C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 724, n.42 (1966), *citing* P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE, Table 53, at 113 (1959). The following Table, adapted from Note, *supra* note 37, at 901 n.14,

The willingness of courts, and particularly trial courts, to provide marital relief in the face of stringent legal requirements appears in yet another context. The number of identified adulterers reached Sodomite levels during the period prior to 1967, apparently indicating both total decay of the moral fiber and extreme clumsiness in the execution of evil intentions. Table I suggests the levels and forms of matrimonial perfidy in the relatively recent past:

TABLE I

Marital Dissolutions in New York: 1951-1955[39]

Year	*Absolute Divorce (Adultery)*	*Annulments*	*Separations*
1951	6,350	4,500	950
1952	6,150	4,500	950
1953	5,800	4,300	900
1954	5,400	3,950	900
1955	4,800	3,750	900

It is bad enough that approximately 4,000 persons during each of these years engaged in some form of pre-marital chicanery, but that between 4,800 and 6,350 should be found to have committed adultery, without connivance, condonation, recrimination or collusion, is remarkable. The explanation lies, of course, in a flourishing organization of lawyers and laymen who operated in concert "a wholesale system of fabricating evidence for a divorce, the services of a co-respondent and witness being supplied for a fee."[40] While grand jury

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further indicates the disparity between announced standards of law and annulment practice in New York:

Comparison of Results in Reported Cases in New York State with Annulments Granted in New York City, 1943–1946

*Reported cases (State)**	*1943*	*1944*	*1945*	*1946*
Denying Annulment	11	3	10	46
Granting Annulment	5	3	5	11
Annulments Granted (NYC)**	1408	1738	2252	4169

* Fraud only
** All grounds

39. Adapted from P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE, Table 53, at 113 (1959). Statistics relating to Enoch Arden decrees, which did not exceed 400 during any of these years, are omitted.

40. W. GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK 285 (1954).

exposure of this scheme in 1948 had some effect on the level of arranged adultery divorce,[41] Table I powerfully suggests its survival and, perhaps, continued vitality. The same conclusion may be drawn from O'Gorman's study, *Lawyers and Matrimonial Cases*,[42] based on interviews conducted in 1958. There, lawyers admitted knowing of and participating in widespread perjury, collusion, and fraud of every kind; indeed, it was suggested, "evasion of the law is characteristic of most New York matrimonial cases."[43]

Summarily stated, it seems that New York, like many other jurisdictions but perhaps more so, developed a dichotomous system of matrimonial law. Formal law bore little relation to law in action; moreover, the latter was frankly engaged in nullifying the former. For some, like Professor Rheinstein, this "democratic compromise" was not only tolerable but admirable; it "preserved peace in respect of an explosive issue, explosive just because it is an issue between beliefs deeply felt and thus unshakable by discussion and incapable of open adjustment."[44] It is not, however, true—as Professor Rheinstein also suggests—that "the only ones who feel troubled [by the coexistence of inconsistent formal and practicing legal regimes] are those occasional academics who view with alarm the hypocrisy of the system, the light-hearted way in which perjuries are committed and condoned, and who fear for the integrity of the law and the respect in which the law and its priests should be held by the public."[45] It is clear that at least in New York these other consequences were viewed with the gravest dissatisfaction by practicing attorneys, judges, social agencies, and the public—none of these groups being especially noted for its delicacy of temperament. O'Gorman's study of practicing matrimonial lawyers revealed a view of this "compromise" bordering on loathing in its intensity.[46] The same feeling is conveyed by the Report of the Special Committee on Matrimonial Law of the Association of the Bar of the City of New York, in reference to the drafting of the Divorce Reform Act.[47] The various evasionary procedures are

41. P. JACOBSON, *supra* note 39, at 115-16.
42. H. O'GORMAN, LAWYERS AND MATRIMONIAL CASES (1963).
43. *Id.* at 29.
44. RHEINSTEIN at 254.
45. *Id.*
46. H. O'GORMAN, *supra* note 42, at 33. Characterizations of then existing divorce law included: " 'Farce,' 'ridiculous,' 'stink,' 'terrible,' 'incredible,' 'asinine,' 'cockeyed,' 'stupid,' 'horror,' 'inhuman,' 'fantastic,' 'outrageous,' and 'puritanical.' " *Id.*
47. Committee Report, *supra* note 16.

termed "nauseating"[48] and "embarrassing";[49] the results "grotesque"[50] and "a chamber of horrors."[51] Substantively, the Report—and other testimony given on the question—reveals grave concern for the social and professional consequences of the bifurcated system of divorce. Specifically noted among the former were: the creation of one law for the rich (who could afford out-of-state proceedings) and none for the poor;[52] the invitation to economic blackmail by one spouse apparently less eager to terminate the marriage, making either a very high or a very low settlement a condition for cooperation in collusive foreign or New York divorce actions;[53] and the creation of "irregular" social relationships by persons too poor and/or upright to secure a divorce through fraud or perjury.[54] It is also clear that these perceptions were widely shared by persons and agencies required to operate under the prevailing system.

The professional consequences of this system were not viewed as less severe, although they operated within a more restricted sphere. As the vituperative character of the foregoing descriptions suggest, professionals do not enjoy being forced—as they see it—to behave unprofessionally, indeed dishonestly. Both judges and lawyers testified to a "virtual rebellion . . . to end this orgy of perjury and disrespect for the law"[55] and to their revulsion at participating in a carefully contrived scheme by which false allegations were proved by one lawyer, and admitted by another, so that the judge may be "[c]ompelled by law to put his signature on a decree, which he and everyone else in the case knows is probably based upon an untruth."[56]

II. The Roots of Reform: Cruelty and Limited Divorce

It seems fair to say that the 1966 Divorce Reform Act reflects a determination that accommodations of the kind described above must be made legislatively rather than worked out in practice and without

48. *Id.* at 40.
49. *Id.* at 39.
50. *Id.* at 40.
51. *Id.* at 38.
52. *Id.* at 40.
53. *Id.* at 41.
54. *Id.*
55. *Id.* at 39.
56. *Id.*

regard to general policy.[57] It was surely intended that the Act would appropriately express the state's interest in the marital relationship, while providing procedures for realizing that interest without the costs incurred under prior law.

It is not comforting, initially, that the Reform Act drew heavily upon existing law that might in principle have been rejected. "Cruel and inhuman treatment" justifying divorce is defined as conduct that "so endangers the physical or mental well-being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant."[58] The origins of this formulation are not obscure; in large part they lie in notions of cruelty for judicial separation that have been recognized since the early 19th century.[59] Past wording was used at least partially to avoid the lengthy litigative process by which a new formulation gains meaning. For this reason, the Bar Association of the City of New York suggested that the new Act allow divorce for "cruel and inhuman treatment of the plaintiff by the defendant":

> [T]hese words already exist in the New York separation statute. They have been construed by the courts time and time again. By using these words we would avoid unnecessary future litigation as to the meaning of substitute phrases.[60]

Ultimately, substantive "change" would have been limited to insertion of the terms "physical or mental well-being" to make it plain that physical abuse was not required—a position already reached, as will appear, by the courts under former law.[61]

No doubt, it is convenient to rely on past formulations. To do so is only rational, however, if prior standards serve policies to be advanced under the new scheme. In this regard, there appears to have been neither careful analysis of the meaning of "cruel and inhuman treatment" under existing law nor any attempt to consider whether

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57. *See* RHEINSTEIN at 364.

58. N.Y. DOM. REL. LAW § 200(1) (McKinney Supp. 1973).

59. *See* Burr v. Burr, 10 Paige 20, 23 (N.Y. 1842), discussed in the text accompanying notes 91-96 *infra*. N.Y. DOM. REL. LAW § 200 (McKinney 1964) continued the standard without change:

> An action [for separation] may be maintained . . . for any of the following causes: 1. The cruel and inhuman treatment of the plaintiff by the defendant. 2. Such conduct on the part of the defendant towards the plaintiff as may render it unsafe and improper for the latter to cohabit with the former.

60. Committee Report at 43.

61. *See* text accompanying notes 101-03 *infra*.

a standard devised for limited divorce could usefully be incorporated into a dissolution statute.

A. *Limited Divorce and the Notion of Cruelty: Generally*

In all probability, the device of limited divorce implicitly recognized that in certain extreme cases, it was impossible to require one spouse to continue living with the other, tempered by the fear—articulated by Blackstone and still reflected in our laws on collusion and connivance—that opportunity for dissolution might well be viewed as an invitation to find grounds for complaint.[62] Nor should the real importance of religious conviction be overlooked; divorce *a mensa* provided relief from intolerable circumstances without abandoning those obligations to God and society undertaken by the parties upon their marriage.[63]

At the same time, this device created special problems for the parties and for society. Since the spouses were not free to establish new familial relationships, they were left, in a real sense, with a choice between celibacy and loneliness on the one hand, and sin on the

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62. Indeed, there was some reason, beyond a pessimistic view of human nature, for that concern. It was not unknown for dissatisfied spouses to search for common relatives, so as to qualify for divorce *a vinculo* by reason of consanguinity or affinity. *See* RHEINSTEIN at 21-22.

63. Obligations to God and society were not, of course, then viewed as sharply distinguishable. The Catholic, and later the Anglican, Church viewed maintenance of the family as matter of the greatest importance. The depth of that interest is reflected in the assertion by ecclesiastical courts of jurisdiction over matrimonial and family matters generally; it is also suggested by the notion of the sacramental character of marriage (formally established by the Council of Trent in 1563).

Although Roman Catholic and not, therefore, strictly appropriate for the later English view, Pope Pius XI's encyclical *On Christian Marriage* (1930) may usefully illustrate the relationship between marital stability and religious concern long believed by religious authorities:

> [S]ince the destruction of family life and the loss of national wealth is brought about more by the corruption of morals than by anything else, it is easily seen that divorce, which is born of the perverted morals of a people, and leads, as experiment shows, to vicious habits in public and private life, is particularly opposed to the well-being of the family and of the State. The serious nature of these evils will be the more clearly recognized, when we remember that, once divorce has been allowed, there will be no sufficient means of keeping it in check within any definite bounds. Great is the force of example, greater still is that of lust; and with such enticements it cannot but happen that divorce and its consequent setting loose of the passions should spread daily and attack the souls of many like a contagious disease or a river bursting its banks and flooding the land.

Pius XI, *On Christian Marriage: An Encylical,* in ASSOCIATION OF AMERICAN LAW SCHOOLS, SELECTED ESSAYS ON FAMILY LAW 132, 160 (1950).

other. The hardship for persons so situated was great, and not lightly to be ordered. Chancellor Kent described the risks in this way:

> These qualified divorces are regarded as rather hazardous to the morals of the parties. In the language of the English courts, it is throwing the parties back upon society, in the undefined and dangerous characters of a wife without a husband, and a husband without a wife. The ecclesiastical law has manifested great solicitude on this subject, by requiring, in every decree of separation, an express monition to the parties "to live chastely and continently" . . . and security was formerly required from the party suing for the divorce, to obey the mandate.[64]

In view of the artificial and generally undesirable consequences of limited divorce, and of the perceived importance of marital stability as a social principle, it is not surprising that strong reasons for separation (*i.e.*, adultery or "cruelty") were required by the ecclesiastical courts.[65] As Sir William Scott put it in *Evans v. Evans*,[66] a leading case on the meaning of cruelty:

> That the duty of cohabitation is released by the cruelty of one of the parties is admitted, but the question occurs, What is cruelty? . . . This . . . must be understood, that it is the duty of Courts, and consequently the inclination of Courts, to keep the rule extremely strict. The causes must be grave and weighty, and such as shew an absolute impossibility that the duties of the married life can be discharged. In a state of personal danger no duties can be discharged; for the duty of self-preservation must take place before the duties of marriage . . .; but what falls short of this is with great caution to be admitted.[67]

The rationale for allowing separation under these circumstances lay, as *Evans* suggests, in the presumptive effect of the conduct in question on the relationship between the parties. Two limiting aspects of this rationale should immediately be noted. In the first place, only certain kinds of conduct could justify the conclusion that married life had become insupportable for the victim. While English courts

64. J. KENT, COMMENTARIES ON AMERICAN LAW *127-28 (1884).

65. Desertion later became a ground for divorce *a mensa*, although a remedy essentially limited to release from the duty of cohabitation may not logically be appropriate where the other spouse has already disappeared. *See* McCurdy, *Divorce—A Suggested Approach with Particular Reference to Dissolution for Living Separate and Apart*, 9 VAND. L. REV. 655, 687 (1956).

66. 1 Hag. Con. 35, 161 Eng. Rep. 466 (1790).

67. *Id.* at 37, 161 Eng. Rep. at 467.

habitually declined to adopt an affirmative test for cruelty,[68] it appears that divorce *a mensa et thoro* was granted only in cases involving violence or at least intentionally and seriously injurious conduct which reasonably led to fear for life or health.[69] As the court observed in *Evans,*

> In the older cases of this sort . . . I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the Court has proceeded to a separation. This doctrine has been repeatedly applied by the Court in the cases that have been cited. The Court has never been driven off this ground. It has been always jealous of the inconvenience of departing from it, and I have heard no one case cited in which the Court has granted a divorce [*a mensa et thoro*] without proof given of a reasonable apprehension of bodily hurt.[70]

The sharp limitations on separation by reasons of cruelty are perhaps best illustrated in *Russell v. Russell,*[71] decided after passage of the Matrimonial Causes Act of 1857[72] but controlled by the princi-

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68. *Id.*

69. McCurdy, *supra* note 65, at 688.

70. 1 Hag. Con. 35, 39-40, 161 Eng. Rep. 466, 468 (1790). Later cases continued the strict requirements of proof. In *Westmeath v. Westmeath,* an ecclesiastical court speaks of danger to life, limb, or health as "the ordinary criteria of legal cruelty in these courts," and required proof of "actual injury or of real apprehension of injury as it may affect the safety or health of a person." 2 Hag. Ecc. Supp. 1, 162 Eng. Rep. 992 (1826), *rev'd,* 2 Hag. Ecc. Supp. 61, 162 Eng. Rep. 334 (1827). And again, in *Neeld v. Neeld,* it was observed:

> The main test which I must apply is, whether all the facts . . . with which Mr. Neeld is now charged, are of a nature and description to satisfy my mind, that a cohabitation can no longer subsist between the parties, without personal danger to Lady Caroline Neeld. . . .
>
> In these suits the species of facts most generally adduced are, first, personal ill-treatment, which is of different kinds, such as blows or bodily injury of any kind; secondly, threats of such a description as would reasonably excite, in a mind of ordinary firmness, a fear of personal injury. For causes less stringent than these the Court has not power to interfere, and separate husband and wife: it is necessity alone which has conferred on the Ecclesiastical courts that power, and in regard to self-protection alone must the exercise of that power be guided. . . . Short of personal violence, or reasonable apprehension of it, I have no authority to interfere.

4 Hag. Ecc. 263, 265, 271, 162 Eng. Rep. 1442, 1443-46 (1831). Without wishing to recapitulate a sad history of assaultive behavior by the husband occasionally accompanied by battery, it may give something of the flavor of the court's approach that, in response to the wife's allegation that she was forced to flee to her room whereupon the defendant sought to break down the door, Dr. Lushington for the Consistory Court remarked, "This, though very inconsiderate, does not carry with it any personal violence." *Id.* at 270, 162 Eng. Rep. at 1445.

71. [1897] All E.R. 1.

72. 20 & 21 Vict., c. 85.

ples that previously governed divorce *a mensa et thoro*.[73] In this leading and highly unedifying case, the wife conducted a vicious personal and public campaign of abuse against her husband.[74] In an earlier matrimonial action, Countess Russell laid some particularly nasty allegations of homosexuality against Lord Russell, which he so completely refuted that counsel for plaintiff apologized in open court for his client's allegation.[75] Undaunted, the Countess, with the help of the more sensational press, continued to air this and other charges which, as Lord Halsbury (then Lord Chancellor) put it, "if believed, would drive [Lord Russell] from human society."[76] Understandably, Lord Russell stopped residing with his wife; she, however, filed suit (the year after her action for divorce) for restitution of conjugal rights. The defendant cross-claimed for judicial separation (as divorce *a mensa* was called after the Matrimonial Causes Act of 1857).[77] The jury granted his requested relief, finding that his wife's accusations were made without any belief in their truth, and for the purpose of securing a favorable financial settlement from him.[78] On these facts, the issue of cruelty was taken to the House of Lords, which held in favor of the wife. Counsel's argument that the true test for cruelty related to the *effect* of the behavior—"whether the circumstances are such as to show an absolute impossibility that the duties of married life can be discharged,"[79]—was quickly disposed of by Lord Herschell. Rather, reliance was placed on *Evans* and other decisions requiring proof of danger to "life, limb or health" to sustain an action for limited divorce.[80] And, since the wife's conduct, although undoubtedly outrageous in the extreme, did not meet that standard the verdict in Lord Russell's favor was reversed.

As the foregoing suggests, the defendant's behavior must have been of a kind that would reasonably cause special harm to his or her spouse, or at least have given rise to a justifiable fear of such injury.

73. [1897] All E.R. at 26. The Matrimonial Causes Act of 1857, 20 & 21 Vict., c. 85, § 22, expressly provides that in proceedings other than for dissolution, the principles formerly adopted by ecclesiastical courts apply.

74. For some earlier litigation indicative of the wife's behavior, see E. MARJORIBANKS, FOR THE DEFENSE: THE LIFE OF SIR EDWARD MARSHALL HALL 94-95 (1930).

75. *Id.* at 94.

76. [1897] All E.R. at 7.

77. 20 & 21 Vict., c. 85, § 7.

78. [1897] All E.R. at 7.

79. *Id.* at 20.

80. *Id.* Among the cases relied on are *Westmeath* and *Neeld*, discussed in note 70 *supra*.

Moreover, and of real importance, the standard was an objective one. Lord Stowell allowed that apprehension of bodily injury would suffice, "but the apprehension must be reasonable; it must not be an apprehension arising merely from an exquisite and diseased sensibility of mind . . . ."[81] In time, some modification in these standards occurred. "Cruelty" complaints came to be sustained on a showing of injury to mental health[82] and ostensibly a subjective test for the effect of injury was adopted.[83] The requirement of a substantial relationship between act and impact still retains considerable strength, however. While psychological or emotional harm will now justify divorce, that effect must be clearly proved, perhaps even by expert evidence if the acts allegedly causing such injury are of marginal gravity.[84] When, however, the defendant's behavior is unquestionably evil—involving the traditional categories of physical abuse, or threat thereof, against the plaintiff or her children—the effect will ordinarily be inferred from the nature of the behavior complemented by the plaintiff's testimony. This relationship will be further explored below;[85] for the moment, it is enough to appreciate the significance of act and impact requirements as devices for defining the conditions under which separation was permissible.

The rationale for separation by reason of cruelty was subject to a further limitation which is not perhaps often thought of in this way: Matrimonial relief would not be granted in the presence of condonation, recrimination or connivance.[86] The latter two—recrimination and connivance—find their principal application in cases of adultery. The defense of condonation, however, has frequently operated to prevent divorce even when acts or threats of violence are involved.[87] Traditionally this bar has been explained in terms of a community interest in keeping together marriages capable of reestab-

81. 1 Hag. Con. 35, 40, 161 Eng. Rep. 466, 468 (1790).
82. *E.g.*, Jamieson v. Jamieson, [1952] 1 All E.R. 875.
83. *Id.*
84. *E.g.*, Pierone v. Pierone, 57 Misc. 2d 516, 293 N.Y.S.2d 256 (Sup. Ct. 1968).
85. *See* text accompanying notes 111-16 *infra.*
86. Collusion is also usually included among these bars, although it is not, properly speaking, a defense. Neither party pleads collusion in any way, and it often comes to the court's attention only after the decree has initially been entered.
87. *E.g.*, Willan v. Willan, [1960] 1 W.L.R. 624 (C.A.) where plaintiff was found to have condoned defendant's habitual use of force and violence, including force directed to performance of sexual relations, by having had intercourse with defendant after use of such force.

lishment—evidenced by the forgiveness of the guilty spouse by the innocent.[88] A corrolary proposition is that the effect on marital relationships presumed to flow from cruel behavior does not uniformly occur; there are in fact cases where the injured spouse *can* continue married life. And, where this appears to be the situation, separation is inappropriate.

B. *The Development of Cruelty in New York Separation Cases*

The New York interpretation of "cruelty" developed in outline if not in detail along the lines followed in England and in most states. It should be noted that the original legislative formulation[89] of that ground was significantly different from other early standards; in still familiar terms, separation might be granted for "the cruel and inhuman treatment by a husband of his wife"; for "such conduct on the part of the husband towards his wife, as may render it unsafe and improper for her to cohabit with him"; and for the "abandonment of the wife by the husband."[90] This statute more clearly suggests the element of cruelty than many others of the same period, and it might well have been inferred from the use of such distinctive language that the legislature intended to modify the English standard. At least, this was the assumption of the Vice Chancellor for the Fourth Circuit in *Burr v. Burr*,[91] who observed: "These causes [for limited divorce] are more comprehensive than those for which a similar separation is decreed by the ecclesiastical courts in England."[92] On appeal, however, it does not appear that the Chancellor was equally convinced that the legislature had intended significant enlargement of the grounds for judicial separation. It is true that behavior by the defendant husband—of a kind usually dismissed by consistorial judges as "inconsiderate" but not involving personal violence

88. Fearn v. Fearn, [1948] P. 241 (C.A.).

89. Devices for divorce in New York are entirely creatures of statute, since it was early decided that state chancery courts had no power to exercise jurisdiction over matters exclusively cognizable by ecclesiastical courts in England. It was held, in Perry v. Perry, 2 Paige 501 (N.Y. 1831), that the law of ecclesiastical courts was never in existence in New York and, consequently, that jurisdiction exclusive to those courts could not be exercised by any New York court, absent legislative authorization. *Id.* at 502.

90. Burr v. Burr, 10 Paige 20 (N.Y. 1842), *quoting* 2 REV. STAT. 302, art. 4, § 51.

91. *Id.*

92. *Id.* at 23 (N.Y. 1842).

—was discussed and perhaps given some weight.[93] The Chancellor did not rely on this misconduct but, rather, went on to observe that:

> [O]n several occasions [the husband] resorted to personal violence amounting to such legal cruelty as would justify the court in decreeing a separation; connected as those acts of violence were with a general course of unkind treatment.[94]

In the result, the husband's conduct was held such as to raise a "well-founded apprehension" on the part of the wife that her health, if not actually her life, was endangered.[95] It is indicative of the Chancellor's desire to bring the case within traditional definitions of cruelty that specific comparison with decisions of the London Consistory Court was thought appropriate[96] and that, in contrast to the Vice Chancellor's opinion, no reference to the special legislative formulation appears.

This limited view of cause for judicial separation seems to have retained vitality perhaps even past its effective modification in England. In *Kennedy v. Kennedy,*[97] some 35 years after *Burr,* the court of appeals relied on Bishop's standard treatise for this "concise and comprehensive" statement of the test for cruelty: "There must be either actual violence committed with danger to life, limb or health, or there must be a reasonable apprehension of such violence."[98] That opinion continues by remarking that "the cases are quite uniform in affirmance" of the rule in *Evans v. Evans,* and then sets forth the following standard for deciding whether a cause of action was presented:

> If it shall appear that the threats of violence were of such a character as to induce a reasonable apprehension of bodily injury, and the charges of infidelity were made in bad faith as auxiliary to, and in aggravation of, the threatened violence, I think this plaintiff may be entitled to relief in this action. If, on the other hand, these charges were made in good faith . . . and if the threats proceeded from mere casual ebullitions of passion and were used to emphasize the charges which the defendant had reason to believe were true, and without any

93. For example, the Chancellor observed that the defendant "habitually used towards [plaintiff], harsh, ungentlemanly, profane, and opprobious language . . . calling her a 'dirty bitch,' and following her from room to room whenever she attempted silently to escape from the effects of his anger, or the indulgence of his more than brutal passions; and this too in the presence of his servants and family." *Id.* at 32.

94. *Id.* at 32-33.

95. *Id.* at 32.

96. *Id.* at 33. The court expressly compared the facts and result in Lockwood v. Lockwood, [1839] 2 Curt. Ecc. 281.

97. 73 N.Y. 369 (1878).

98. *Id.* at 374, *quoting* 1 J. BISHOP, MARRIAGE AND DIVORCE 717 n.4 (1864).

> real intention to inflict bodily harm, and if the plaintiff had no sufficient reason for so believing, it is clear she would not be entitled to a divorce.[99]

The interesting question, not directly addressed by the court of appeals, is whether separation could be ordered if the defendant's charge of unfaithfulness were in fact made in bad faith, but the threats could not reasonably be viewed as presenting a danger of bodily harm. The court's reliance on Bishop and reference to *Evans,* as well as its own statement of the issue, suggest that the statutory formulation relating to conduct rendering it unsafe and improper for the wife to cohabit with her husband was not viewed as substantially modifying traditional notions of cruelty. This ambiguity was, to an extent, relieved in *Pearson v. Pearson,*[100] perhaps the first leading case in the modern line of authority of cruel and inhuman treatment. As in *Kennedy,* repeated charges of unfaithfulness were made by the wife against her husband; unlike the earlier case, there was no allegation of actual or threatened physical violence.[101] The issue, for our purposes, was whether proof of nagging, scolding, and unjustified accusations of infidelity would support an action for judicial separation.[102] This question was squarely answered in the affirmative; the term "cruel and inhuman conduct" was held "broad enough to include such behavior of one party as may be reasonably said so to affect the other physically or mentally as seriously to impair health. Cruelty is not limited to bodily hazard and hardship."[103] In almost the same breath, however, that holding was qualified. An effort was made to distinguish, rather than overrule *Kennedy* on the ground that the accusations of unfaithfulness here were made publicly and

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99. *Id.*

100. 230 N.Y. 141, 129 N.E. 349 (1920).

101. *Id.* at 140, 129 N.E. at 350.

102. *Id.* The *Pearson* case actually arose in a somewhat different posture. Mrs. Pearson brought an action in New York to recover from her husband sums expended from her separate estate and for necessaries incurred after he left her. The defendant-husband asserted that her conduct toward him amounted to cruel and inhuman treatment which, if established, would have justified him in leaving her and negated the obligation of support during that separation. The husband had, in the meantime, prosecuted a Nevada divorce action based on cruelty, in which plaintiff unsuccessfully appeared. The effectiveness of that decree for purposes of terminating marital status was granted and, of course, the facts pleaded and established in that proceeding were taken as binding in New York. The resulting question, then, was whether on those facts, which included no allegation of physical violence, a New York court would have granted a decree of separation.

103. *Id.* at 146, 129 N.E. at 351.

resulted in loss of professional standing, and were therefore more likely to cause mental suffering and impairment of health. More important, the court concluded its discussion with an oft-cited limitation on judicial relief in separation actions:

> The test of cruel and inhuman treatment where no blows are struck or threatened should be applied with great caution. Insulting and angry words may cause discomfort and annoyance, but their natural purpose and effect is neither to injure health nor to endanger reason. Incompatibility of temper is no ground for separation in New York. The misery arising out of domestic quarrels does not justify a termination of the legal rights and duties of husband and wife. For such ills, the patients minister unto themselves; our courts of justice offer no cure.[104]

Pearson, even with its caution, could have served as a point of departure for the view that separation will be available where one spouse's behavior is such as to visit a degree of mental suffering, subjectively determined, that makes the other spouse's continued cohabitation intolerable. And, in a formal sense, perhaps that is its meaning. The reported cases suggest, however, that the limitations discussed in *Pearson* have equal or greater significance than the holding. While the courts frequently espouse the principle that conduct "may produce such mental pain as to be even more cruel and inhuman than if mere physical pain had been inflicted,"[105] enunciation of this notion generally precedes a finding that cruelty has not been established on the facts actually presented. Without reviewing each reported decision in New York, examination of the lengthy line of cases citing *Pearson* is instructive in this regard. Since *Pearson* is the leading court of appeals decision on the meaning of cruelty, and expressly holds that mental injury may justify relief, one would expect it to be used both where separation is ordered and where it is denied. As it happens, 32 opinions between 1920 and 1967 cited that decision on the issue of whether certain facts, if proved, would or did establish "cruel and inhuman treatment." In 27 of these the evidence or allegations were held insufficient.[106] Moreover, many of those decisions

104. *Id.* at 148, 129 N.E. at 351.

105. Avdoyan v. Avdoyan, 265 App. Div. 763, 764, 40 N.Y.S.2d 665, 666 (1st Dep't 1943).

106. Schapiro v. Schapiro, 27 App. Div. 2d 667, 276 N.Y.S.2d 678 (2d Dep't 1967); People v. Roosevelt, 13 App. Div. 2d 334, 216 N.Y.S.2d 604 (1st Dep't 1961); Krugman v. Krugman, 286 App. Div. 1029, 145 N.Y.S.2d 35 (2d Dep't 1955); Drib-

chose to quote and rely on the limitations and the language respecting incompatibility found in *Pearson*.[107] In only two cases citing *Pearson* did the evidence satisfy the test for cruelty.[108] In one, substantial injury to the plaintiff was proved, including shock, suicide attempts, and several instances of hospitalization for mental illness.[109] The other does not report the facts in any detail, perhaps because the trial court was reversed on other grounds.[110]

Generally speaking, the highly traditional elements of cruelty have been stressed: The quality of the act, its impact—inferred or demonstrable—on the plaintiff, and the defendant's state of mind.

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ben v. Dribben, 279 App. Div. 1029, 107 N.Y.S.2d 481 (2d Dep't 1951); Gabriel v. Gabriel, 274 App. Div. 141, 79 N.Y.S.2d 823 (1st Dep't 1948); Schechter v. Schechter, 267 App. Div. 138, 44 N.Y.S.2d 864 (1st Dep't 1943); Avdoyan v. Avdoyan, 265 App. Div. 763, 40 N.Y.S.2d 665 (1st Dep't 1943); Solomon v. Solomon, 263 App. Div. 678, 34 N.Y.S.2d 367 (1st Dep't), *rev'g* 26 N.Y.S.2d 213 (Sup. Ct. 1941); Morris v. Morris, 260 App. Div. 6, 20 N.Y.S.2d 782 (1st Dep't 1940); Greene v. Greene, 244 App. Div. 219, 278 N.Y.S. 955 (1st Dep't 1935); Strnad v. Strnad, 238 App. Div. 572, 266 N.Y.S. 159 (1st Dep't 1933); Straub v. Straub, 208 App. Div. 663, 204 N.Y.S. 61 (1st Dep't 1924); Tausik v. Tausik, 38 Misc. 2d 11, 235 N.Y.S.2d 776 (Sup. Ct. 1962); Rosenberg v. Rosenberg, 28 Misc. 2d 922, 216 N.Y.S.2d 330 (Sup. Ct. 1961); Kronenberg v. Kronenberg, 203 N.Y.S.2d 218 (Sup. Ct. 1960); McClinton v. McClinton, 200 N.Y.S.2d 987 (Sup. Ct. 1960); Ross v. Ross, 17 Misc. 2d 900, 186 N.Y.S.2d 118 (Sup. Ct. 1959); Fox v. Fox, 17 Misc. 2d 998, 186 N.Y.S.2d 542 (Sup. Ct. 1958); Ross v. Ross, 4 Misc. 2d 399, 149 N.Y.S.2d 585 (Sup. Ct. 1956); Marino v. Marino, 145 N.Y.S.2d 571 (Sup. Ct. 1955) (dictum); Shearer v. Shearer, 73 N.Y.S.2d 337 (Sup. Ct. 1947); Treherne-Thomas v. Treherne-Thomas, 178 Misc. 634, 35 N.Y.S.2d 619 (Sup. Ct. 1942); Browning v. Browning, 129 Misc. 137, 220 N.Y.S.2d 651 (Sup. Ct. 1927); Brown v. Brown, 208 N.Y.S. 17 (Sup. Ct. 1924); McCarthy v. McCarthy, 199 Misc. 680, 103 N.Y.S.2d 808 (Dom. Rel. Ct. 1951); *In re* Sheard's Estate, 95 N.Y.S.2d 636 (Sur. Ct. 1950); Gurnee v. Gurnee, 53 N.Y.S.2d 690 (Dom. Rel. Ct. 1945).

107. Gabriel v. Gabriel, 274 App. Div. 141, 142, 79 N.Y.S.2d 823, 824 (1st Dep't 1948); Schechter v. Schechter, 267 App. Div. 138, 44 N.Y.S.2d 864, 865 (1st Dep't 1943); Solomon v. Solomon, 263 App. Div. 678, 679, 34 N.Y.S.2d 367, 369 (2d Dep't 1942); Morris v. Morris, 260 App. Div. 6, 20 N.Y.S.2d 782, 783 (1st Dep't 1940); Greene v. Greene, 244 App. Div. 219, 222, 278 N.Y.S. 955, 958 (1st Dep't 1935); Straub v. Straub, 208 App. Div. 663, 666, 204 N.Y.S. 61, 63 (1st Dep't 1924); Ross v. Ross, 4 Misc. 2d 399, 402, 149 N.Y.S.2d 585, 588 (Sup. Ct. 1956); McCarthy v. McCarthy, 199 Misc. 680, 682, 103 N.Y.S.2d 808, 811 (Sup. Ct. 1951); Shearer v. Shearer, 73 N.Y.S.2d 337, 354 (Sup. Ct. 1947); Treherne-Thomas v. Treherne-Thomas, 178 Misc. 634, 636, 35 N.Y.S.2d 619, 620 (Sup. Ct. 1942); Gurnee v. Gurnee, 53 N.Y.S.2d 690, 692 (Dom. Rel. Ct. 1945).

108. Knapp v. Knapp, 273 App. Div. 993, 78 N.Y.S.2d 729 (1st Dep't 1948); Axelrod v. Axelrod, 2 Misc. 2d 79, 150 N.Y.S.2d 633 (Sup. Ct. 1956).

109. Axelrod v. Axelrod, 2 Misc. 2d 79, 83-84, 150 N.Y.S.2d 633, 637-38 (Sup. Ct. 1956).

110. Knapp v. Knapp, 273 App. Div. 993, 995, 78 N.Y.S.2d 729, 730 (1st Dep't 1948). The appellate court found that plaintiff "condoned and forgave any acts of cruel and inhuman treatment on the part of defendant found by the trial court." *Id.* at 993, 78 N.Y.S.2d at 730.

Certain forms of behavior—physical abuse, or special kinds of non-physical conduct such as repeated gratuitous accusations of infidelity[111] —were viewed as so probably harmful as to imply injury. In these cases harm to the plaintiff could be inferred, or at least testimonially established without special requirements of proof.[112] Where the acts do not intrinsically suggest severe injury, however, the intent factor has been important. Cruelty, it has been held, "contains the atmosphere of *wantonness,* of intent to inflict suffering with deliberateness."[113] Accordingly, when the behavior involved is of a kind that might reasonably occur without intent or awareness of injury on the actor's part, separation may be denied. By the same token, the defendant's state of mind may color his or her conduct. If a "studied and persistent attempt" is made by one spouse to render the other's life intolerable, separation may be granted even though the behavior itself, unaccompanied by such proved intent, would not justify relief.[114]

The situation is different, however, where the offensive behavior is less patently harmful, and not obviously accompanied by desire to injure. Several cases suggest that, in such instances, evidence of harm must be more than *pro forma,* and, perhaps, the unsubstantiated testimony of the plaintiff will not suffice.[115] Indeed, it has been suggested that *illness* must be proved before relief is available:

> The cruelty here perpetrated was essentially of the mental type, founded on a course of mutual misconduct and retaliation, culminating in the wife's refusal to assist her husband after he had spent several thousands of dollars to erect and furnish an office for [his business] purpose. There is no proof, however, that she became ill as a result of such mental cruelty. . . . In the absence of evidence of illness there is a failure of proof of a cause based on cruelty.[116]

The requirements for proof of injury cut two ways. On the one

111. *See, e.g.,* Smith v. Smith, 273 N.Y. 380, 383, 7 N.E. 2d 272, 273-74 (1937).

112. *E.g.,* Brokaw v. Brokaw, 66 Misc. 307, 123 N.Y.S. 17 (Sup. Ct.), *aff'd,* 147 App. Div. 906, 131 N.Y.S. 1106 (2d Dep't 1911); Nocilla v. Nocilla, 212 N.Y.S.2d 654 (Sup. Ct. 1961).

113. Serota v. Serota, 20 Misc. 2d 184, 185-86, 186 N.Y.S.2d 713, 716 (Sup. Ct. 1959).

114. *See* Weaver v. Weaver, 74 App. Div. 591, 594, 77 N.Y.S. 568, 570 (4th Dep't 1902); Shearer v. Shearer, 73 N.Y.S.2d 337, 354 (Sup. Ct. 1947).

115. *See, e.g.,* Pierone v. Pierone, 57 Misc. 2d 516, 293 N.Y.S.2d 256 (Sup. Ct. 1968).

116. Rosenberg v. Rosenberg, 28 Misc. 2d 922, 923, 216 N.Y.S.2d 330, 331 (Sup. Ct. 1961). *See* Traylor v. Traylor, 3 App. Div. 2d 727, 159 N.Y.S.2d 818 (2d Dep't 1957).

hand, they make clear that a subjective standard for harm obtains, and that there are cases in which relief will be granted even in the absence of objectively extreme misconduct. At the same time, the degree of difficulty in establishing mental injury in such cases limits the occasions for relief; it serves, perhaps, to mark the critical line between those forms of misery that are the accepted lot of marriage[117] and those which strongly require relief.

The point at which conduct not threatening violence passes from "bickering" to "cruelty" has, apparently, remained insusceptible of confident delineation. Moreover, great caution has been exercised to avoid overstepping that hidden boundary. Where cruelty has been found, at least recently, physical assault and physical injury have usually been involved.[118] Gross financial neglect also has occasionally supported a successful action for separation,[119] particularly when harm of a special kind has been suffered by the plaintiff. There are relatively few cases which in fact turn on nonphysical abusiveness and, in many of these, occasional assaultive behavior has been involved,[120] or reference has been made to the special circumstances of plaintiff's health.[121]

Equally significant are the cases in which relief has been denied. Many of them presented profoundly unfortunate human circumstances under which, it seems, the spouses were required formally to continue their marriage. In *Fox v. Fox*,[122] the court began its analysis with an almost smug but typical dictum:

> This case presents a not unusual picture of a matrimonial ship which, after having been tossed for several years in the turbulent waters

117. *See* Pearson v. Pearson, 230 N.Y. 141, 129 N.E. 349, 351 (1920); Avdoyan v. Avdoyan, 265 App. Div. 763, 766, 40 N.Y.S.2d 665, 667 (1st Dep't 1943).

118. *E.g.*, Bittson v. Bittson, 138 N.Y.S.2d 294 (Sup. Ct.), *appeal dismissed*, 285 App. Div. 893, 139 N.Y.S.2d 251, *aff'd*, 285 App. Div. 1061, 140 N.Y.S.2d 508 (2d Dep't 1955) (physical beating with abduction of child to Portugal); Schaefer v. Schaefer, 30 Misc. 2d 278, 214 N.Y.S.2d 59 (Sup. Ct. 1961) (physical beating and substantial physical injury); Phillips v. Phillips, 15 Misc. 2d 884, 180 N.Y.S.2d 475 (Sup. Ct. 1958) (physical assault with physical injury); Fixel v. Fixel, 207 Misc. 250, 137 N.Y.S.2d 744 (Sup. Ct. 1955) (physical beatings accompanied by threats to throw wife out of window).

119. *E.g.*, Lindley v. Lindley, 162 N.Y.S.2d 217 (Sup. Ct. 1957) (nonsupport to point where wife sold blood to support herself).

120. *E.g.*, Nocilla v. Nocilla, 212 N.Y.S.2d 654 (Sup. Ct. 1961); Meadow v. Meadow, 52 N.Y.S.2d 18 (Sup. Ct. 1944).

121. *E.g.*, Nocilla v. Nocilla, 212 N.Y.S.2d 654 (Sup. Ct. 1961); Axelrod v. Axelrod, 2 Misc. 2d 79, 150 N.Y.S.2d 633 (1956).

122. 17 Misc. 2d 998, 186 N.Y.S.2d 542 (Sup. Ct. 1958).

> of marital dissension and bickering, finally foundered on the shoals of irreconcilable discord and incompatibility.[123]

And, immediately after *Pearson,* another judge observed that "the fact that incompatibility exists, and that the parties find it impossible to live in harmony, while no doubt furnishing ample reasons for entering into a decision mutually to separate, does not begin to meet the requirements for a judicial separation."[124]

III. The Rationality of Limited Cruelty for Absolute Divorce

A. *The Importation of Limited Cruelty into Absolute Divorce Law*

The upshot of the developments just described, in New York as in England and in other states, was to make divorce *a mensa et thoro* for cruelty available only in the event of grave misconduct seriously threatening the health of the victim. Other behavior, though undeniably offensive or even harmful, would not satisfactorily prove the existence of marital breakdown so as to entitle the injured party to refuse continuance of the marital relationship. Moreover, if despite the certain commission of cruel acts it appeared that the victim could continue relations with the wrongdoer, the presumption of marital breakdown was overcome and separation would be denied. The rationality of these rules lies primarily in their relationship to the form of relief available. When the only acceptable remedy available lies in creation of an artificial and dangerous social situation, it is rational (if not necessarily wise) to allow that result only when the most compelling reasons exist for so doing. Concomitantly, husbands and wives were expected (indeed required) to accommodate themselves to behavior that was undeniably obnoxious, distressing, or harmful, since the only available choices were accommodation or separation without remarriage.

What is rational policy under one set of circumstances, however, often ceases to be so in a different setting. With the coming of judi-

123. *Id.* at 999, 186 N.Y.S.2d at 543.

124. Brown v. Brown, 208 N.Y.S. 17, 18 (Sup. Ct. 1924). Incompatibility, but not cruelty, has often been found in New York. *See* Avdoyan v. Avdoyan, 265 App. Div. 763, 40 N.Y.S.2d 665 (1st Dep't 1943); McClinton v. McClinton, 200 N.Y.S.2d 987 (Sup. Ct. 1960); Fox v. Fox, 17 Misc. 2d 998, 186 N.Y.S.2d 542 (Sup. Ct. 1958).

cial dissolution divorce, first in the United States[125] and then in England,[126] two principal constraints on recognizing disruption of marital relationships disappeared. The implications of this change, regrettably, went largely unappreciated for some considerable time. Early American statutes frequently restricted grounds for divorce to adultery and desertion, with cruelty generally included later and with caution.[127] In England, cruelty did not become a ground for absolute divorce until 80 years after that form of relief first became available.[128]

More important, and of special significance for the present discussion, the body of law developed for divorce *a mensa et thoro* was carried over to absolute divorce proceedings. It appears that although the definition of "cruelty" has been broadened, particularly with respect to mental injury, the principles laid down by Lord Stowell in *Evans v. Evans* remained valid in England for both separation and dissolution actions,[129] at least until the far reaching Divorce Reform Act of 1969.[130]

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125. *E.g.*, MASS. ANN. LAWS ch. 208, § 1 (1958). *See* McCurdy, *supra* note 65, at 689.

126. Matrimonial Causes of Act of 1857, 20 & 21 Vict, c. 85.

127. *See* M. PLOSCOWE, H. FOSTER & D. FREED, FAMILY LAW: CASES AND MATERIALS 393 (2d ed. 1972); RHEINSTEIN, *supra* note 3, at 33-34 (1972). It appears, however, that some states—primarily in the northeast where the Protestant and liberal social beliefs were strongly held—allowed dissolution for cruelty at an early date. New Hampshire in 1791 allowed divorce for cruelty, McCurdy, *supra* note 65, at 689 n.25. In Rhode Island judicial divorce was available in cases of "gross misbehavior and wickedness repugnant to and in violation of the marriage covenant" by 1788. RHEINSTEIN at 34.

128. Matrimonial Causes Act of 1937, 1 Edw. & 1 Geo, c. 57, § 2(c). The Matrimonial Causes Act of 1857 made cruelty a ground for judicial separation only. Dissolution was available to the husband by reason of his wife's adultery. The wife could obtain that relief for bigamy, certain sexual offenses, "aggravated" adultery by the husband, or for adultery combined with cruelty or desertion of a kind that would independently establish a ground for judicial separation. Matrimonial Causes Act of 1857, 20 & 21 Vict, c. 85, § 27.

129. J. C. HALL, SOURCES OF FAMILY LAW 372 (1966). The House of Lords had occasion to discuss this point in Jamieson v. Jamieson, [1952] 1 All E.R. 875, with general agreement among the Lords that, while there was room for differences regarding the kinds of facts making out a case of cruelty, and while cruel acts causing actual or probable injury to mental health would satisfy the requirements for divorce, the principles previously developed for cruelty cases continued in force. As Lord Merriman observed, "what [cruelty] is was settled by *Russell v. Russell.*" [1952] 1 All E.R. 875, 883.

130. The Divorce Reform Act of 1969, c. 55, which did not come into effect until January 1, 1971, made breakdown of marriage the sole ground for divorce. *Id.* § 1. Breakdown may be proved by any of a set of enumerated facts, including "that the respondent has behaved in such a way that the petitioner cannot reasonably be ex-

American courts took much the same approach. True enough, ecclesiastical courts and, less clearly, their practice never took root in the colonies.[131] When divorce statutes were adopted, however, they tended to use the categories of English matrimonial law (*i.e.*, adultery, cruelty and desertion) without independent definition of those terms.[132] It is not, therefore, surprising that courts often drew upon English law concerning divorce *a mensa*, either expressly or implicitly, in construing this new body of legislation.[133] *Shaw v. Shaw*[134] offers as good an instance of this process as any. The Supreme Court of Errors of Connecticut was called upon in 1845 to interpret a then-recent statute allowing divorce by reason of "intolerable cruelty."[135] The court began by referring to Lord Stowell's opinion in *Evans* for the salutary principle that "the happiness of the married life is secured, by its indissolubility . . . and in cases of this character . . . it is the duty of courts, and, consequently, it is the inclination of courts, to keep the rule extremely strict."[136] Chief Justice Williams then analyzed the question before him in the following way:

> [W]e proceed to the enquiry, what is that "intolerable cruelty" spoken of in the statute? It doubtless speaks of acts done to the wife herself; and we understand it to import barbarous, savage, inhuman acts . . . . The legislature must have had in view acts as cruel at least as those for which, under the head of *extreme cruelty*, the ecclesiastical courts in Great Britain divorce *a mensa et thoro;* and those decisions may furnish some assistance upon the subject, though they are not to be taken as authority.[137]

And, indeed, English decisions furnished considerable assistance, for

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pected to live with the respondent." *Id.* § 2(b). It has been suggested that the principles discussed above have been rendered obsolete by this provision, J. C. HALL, SOURCES OF FAMILY LAW, SUPPLEMENT 116 n.373 (1971), but the extent to which this is true is not yet clear.

131. McCurdy, *supra* note 65, at 689-90 n.26.

132. *Id.* at 689.

133. The precedential value of ecclesiastical court decisions is a matter of some dispute. One view asserts that they are part of the common law, even though the courts themselves were never established in this country; according to another, American divorce statutes expressly adopted that body of law by reference. A third opinion rejects both of these positions, but accords persuasive weight to English decisional law. *Id.* at 689-90 n.26; Note, *Ecclesiastical Law: How Far Adopted in United States,* 30 HARV. L. REV. 283 (1917). Whatever the situation with regard to this aspect of the problem of reception of the common law in this country, it is clear that cases decided by Consistorial courts were treated with considerable respect by American judges.

134. 17 Conn. 189 (1845).

135. *Id.* at 193.

136. *Id.*

137. *Id.*

the Court relied heavily on *Evans* and its progeny in giving meaning to the statutory language.[138]

One could safely suggest, as a general proposition, that the formal standards of cruelty for purposes of absolute divorce were originally held (and, often, still remain) consistent with those used for judicial separation. As in *Shaw,* reference to cases involving limited divorce when dissolution is at issue enjoys considerable acceptance. Moreover, when nonequivalence is found, the looser standard tends to occur where judicial separation is sought.[139] Why either of these results came to pass is still unclear. The most probable explanation lies in the process of interpretation revealed in *Shaw.* Dissolution statutes typically did not define cruelty. The courts looked back to a silent legislative history and, finding no help in that direction, concluded that the legislature meant to adopt a meaning already known to "divorce law": that developed for limited divorce either by ecclesiastical courts or by earlier statute. It is probably true, as one authority suggests,[140] that early legislators would not have been acquainted with the considerable body of law on marital separation developed in consistorial courts. Even so, it is by no means odd that such familiarity should be imputed by judges in search of a rationale. The alternative would likely have required reading "cruelty" according to its popular usage, an approach that implicity assumes a relatively liberal standard. This approach was probably unacceptable and unwarranted by reference to then-contemporary attitudes.

B. *The Notion of Cruelty and the Divorce Reform Act: In Principle*

What neither legislatures nor appellate courts seriously attempted, however, was to rationalize the grounds for relief in terms of the remedy available. Once the principle of dissolubility for post-

138. Other courts have followed the same path. As the Florida Supreme Court once had occasion to observe,

> [S]ome of our American statutes seem to have been copied from rules which obtain in the ecclesiastical courts of England and our courts, and thus similar rules of construction are applied to such statutes, and thus some of the settled principles and practices of those courts become guides for our courts, as in construing a statute making "cruelty" a ground of divorce without specific definition of that term.

Chisholm v. Chisholm, 98 Fla. 1196, 1223-24, 125 So. 694, 703 (1929). *See* McCurdy, *supra* note 65, at 690-91.

139. *E.g.,* McClintock v. McClintock, 147 Ky. 409, 421, 144 S.W. 68, 73 (1912).

140. M. PAULSEN, W. WADLINGTON & J. GOEBEL, DOMESTIC RELATIONS: CASES AND MATERIALS 418 (1970).

marital cause was accepted, the burden of limiting access to divorce shifted almost entirely to notions of simple deterrence. In simplicity, however, there lay strength; the concern that relief, once allowed, would be widely pursued—a concern which had long prevented enactment of absolute divorce laws—became, if anything, stronger with their passage. Certainly, much debate was had on the relative importance of protection of marriage on the one hand and relief from personal misery on the other.[141] And, for some considerable time, the proposition that continuance of marital relationships might be impossible, or even undesirable, for reasons other than extreme misconduct of a narrowly defined type was rejected in service of felt requirements of marital stability.

It must, with regret, be reported that even after adoption of the Divorce Reform Act in 1966, lower New York courts appear somewhat loathe to leave the 19th century behind. In particular, an approach much like that revealed in *Shaw* 125 years ago has found considerable favor among judges called on to interpret "cruel and inhuman treatment" under the recent dissolution statute. Like their predecessors, most have expressly or implicity relied on principles developed in separation cases for enlightenment in proceedings for absolute divorce. In *Pierone v. Pierone,*[142] an early decision which has become something of a leading case, reliance on traditional notions of cruelty is explicit. Plaintiff alleged and testified that his wife left home a month before institution of the action, that prior to her departure she was drinking almost every day, stayed out late at night, was abusive to him and to her children, and did not perform her household tasks. By way of showing impact, plaintiff further testified that he suffered a general decline of health, accompanied by loss of sleep and nervousness. Corroborative evidence on both conduct and effect was offered, typically enough, by plaintiff's sister.

Although it may well be thought that defendant's course of conduct made plaintiff's life intolerable, this circumstance was not sufficient in the court's view to justify relief. The court of appeals held that it must be established that defendant's acts "seriously [affect] the health of a spouse and [threaten] permanently to impair it," as prior decisions had required.[143] Absent such proof, the court ob-

141. RHEINSTEIN at 40-46.
142. 57 Misc. 2d 516, 293 N.Y.S.2d 256 (Sup. Ct. 1968).
143. *Id.* at 517, 293 N.Y.S.2d at 258.

served, "the innocent spouse may continue indefinitely to suffer misery and unhappiness, but this is a risk he assumed when the marriage took place."[144] Moreover, impairment to health would not be inferred from the defendant's behavior which, objectively viewed, was not highly threatening. Faithful to authority under prior law,[145] the court held that plaintiff's testimony regarding nervousness, loss of sleep, and general deterioration of health, "unsupported by any competent medical evidence to that effect, falls far short of the proof required in a cause based on cruelty."[146]

The same conclusions were reached by the Appellate Division for the First Department in *Rios v. Rios.*[147] Referring with approval to *Pierone* and to former law, the court summarized the principles applicable to cruelty divorce.

> The law is well settled in this State that in order to obtain a separation on the ground of cruel and inhuman treatment, the plaintiff must either establish a pattern of actual physical violence or if actual violence is not involved, the conduct must be such as seriously affects the health of the spouse and threatens to impair it and renders it unsafe to cohabit. The measure of proof to sustain a divorce on the ground of cruel and inhuman treatment is no less than that required for a separation.[148]

Despite a finding by the trial court that plaintiff had been subjected to harassment and to recklessly made false accusations of infidelity,[149] judgment of divorce was reversed by reason of insufficient evidence. Expressly in *Rios,* and by clear implication in *Pierone,* the *Pearson* dictum denying marital relief for "the misery arising out of domestic quarrels" has been read into the Reform Act.

Even where reported cases have granted dissolution for cruel and inhuman treatment, distinct efforts have been made to satisfy traditional criteria. Perhaps the most careful opinion in a successful action appears in *Berlin v. Berlin,*[150] decided after both *Pierone* and *Rios.* The acts there complained of were not physically abusive; rather, they involved verbal attacks, refusal to speak with the wife for

144. *Id.* at 518, 293 N.Y.S.2d at 258.
145. *See id.* at 517, 293 N.Y.S.2d at 258; Houck v. Houck, 59 Misc. 2d 1070, 300 N.Y.S.2d 999 (Sup. Ct. 1968).
146. 57 Misc. 2d 516, 518, 293 N.Y.S.2d 256, 258 (Sup. Ct. 1968).
147. 34 App. Div. 2d 325, 311 N.Y.S.2d 664 (1st Dep't 1970).
148. *Id.* at 326, 311 N.Y.S.2d at 666.
149. *Id.*
150. 64 Misc. 2d 352, 314 N.Y.S.2d 911 (Sup. Ct. 1970).

weeks and months at a time, refusal to eat with the family or generally to participate in family life, and refusal to cohabit with plaintiff for some 14 months. Further, the defendant's neglect of his wife when she returned from cancer surgery—leaving her without assistance and alone—suggested gross indifference. These facts, taken with plaintiff's testimony as to psychiatric care and medication prescribed for her, made out, the court said, a case of "mental distress in the face of cruel and wanton conduct calculated to inflict suffering."[151] More recently, in *Barnier v. Barnier*,[152] great pains were taken to adopt the principles of *Rios* but distinguish its facts. There, as in *Berlin*, plaintiff's testimony that he had sought and received medical care and treatment, could no longer perform in his work and had become a nervous wreck was emphasized and specifically distinguished from the evidence in *Rios*.[153]

It has been suggested that the narrow view of cruelty was approved by the court of appeals in its memorandum affirmance of the *Rios* decision,[154] although this is far from clear. The court apparently agreed with the appellate division's finding (and defendant's contention on appeal) that plaintiff had "failed to prove that his wife's conduct constituted cruel and inhuman treatment endangering . . . [his] physical or mental health . . . rendering it unsafe or improper to cohabit."[155] It did not, however, take the opportunity to address directly the standard to be applied in subsequent cruelty cases, nor was there any reference to the reasoning of the court below or to any other decisional authority. Since the court of appeals was silent on the principle issue, it becomes important that the appellate division report set forth remarkably little evidence concerning the nature and effect of defendant's behavior. Taking the narrowest and, it is submitted, the preferable view, the court of appeals may well have considered Mr. Rios' evidence insufficient to justify a charge of cruelty under any allowable construction of the Reform Act, without considering whether the appellate division's interpretation of the statute was correct.

There is, it must be admitted, some superficial justification for

151. *Id.* at 355, 314 N.Y.S.2d at 916.

152. — App. Div. 2d —, 349 N.Y.S.2d 113 (2d Dep't 1973).

153. *Id.* at —, 349 N.Y.S.2d at 114-15.

154. 29 N.Y.2d 840, 277 N.E.2d 786, 327 N.Y.S.2d 853 (1971). *See* PRACTICING LAW INSTITUTE, MATRIMONIAL MATTERS: LATEST DEVELOPMENTS UNDER NEW YORK DIVORCE LAW 141-42 (1973) for the view that the Court of Appeals affirmance of *Rios* represents an adoption of the appellate division's approach.

155. *Id.*

the restrictive line of interpretation. It has already been noted that the statutory formulation of "cruel and inhuman treatment" for divorce is largely derived from prior judicial separation legislation, and that reference to past jurisprudence was contemplated by some proponents of the reform. On the other hand, so mechanical an approach is not justified by reference to the statutory scheme as a whole. Indeed, New York courts, by importing prior interpretations of cruelty into the Divorce Reform Act, may well be undoing much of its useful thrust. At the broadest level, the foregoing decisions have failed to consider, except negatively, the basic principles underlying the new law. Two related misconceptions appear to be involved: that the change in the nature of matrimonial relief (from limited to absolute divorce) has no significance for the meaning of cruelty and, more critical yet, that social policy regarding marriage remains generally as it was before 1967. With respect to the first, it will be recalled that the "great caution" used by courts in finding cruelty under former law was in significant part justified by the nature of the relief available. When an artificial social arrangement must result from intervention, there is perhaps reason to require clear proof that no other *modus vivendi* exists. For this purpose, as well, objective standards of cruelty were formulated which, even over time, became only quasi-subjective (in the sense that special evidence of injury remained necessary where the defendant's conduct was not directly or intentionally harmful). It should, however, be obvious that this concern is no longer pressing; indeed, it is barely relevant. The availability of several grounds for dissolution carries significance in itself, since the parties are no longer condemned to one form of misery in place of another, and there is even the hope that socially and personally rewarding new alliances may result.

But the Reform Act surely involves a yet more fundamental change in social policy. Prior to 1967, concern for marital stability was thought to require that the social fact of marital breakdown be ignored in law, save where adultery was proved. That divorce may now be granted after separation for one year demonstrates a substantial redefinition of the state's interest in marital relationships. As the court of appeals observed in *Gleason v. Gleason*:

> Implicit in the statutory scheme is the legislative recognition that it is socially and morally undesirable to compel couples to a dead marriage to retain an illusory and deceptive status and that the best

> interests not only of the parties but of society itself will be furthered by enabling them "to extricate themselves from a perpetual state of marital limbo."[156]

To put it plainly, the Reform Act adopts a "marital breakdown" principle. Dissolution is now not only appropriate, but indeed socially important, in cases where there has been neither legal fault nor the wanton infliction of demonstrable and grave injury. The parties need not even show that, for whatever reason, they *cannot* cohabit together; it will do that they prefer living apart and do so for a year. It is strikingly clear that *Pearson* has, in significant part, been overruled. No longer is it true that "the misery arising out of domestic quarrels does not justify a termination of the legal rights and duties of husband and wife." Courts of justice *do* now offer a cure for these ills, as long as the misery is such that the parties can separate for a year.

Most courts construing "cruel and inhuman treatment" have, thus far, missed this point. Inclusion of the separation provisions did not merely add one more device for divorce; it reflected a pronounced shift in basic public policy in accordance with which the entire Reform Act must be interpreted. It is not necessary that there be a single source of misery and a single victim; the "myth of the innocent spouse" has been firmly laid to rest and with it the adversarial underpinnings of classical martimonial law.[157] Nor, as once was true,[158] will attempts to reestablish the relationship cut off grounds for complaint,[159] not because the state is uninterested in sustaining viable relationships, but because viability is properly determined at the time relief is sought. The difference between this and the "living apart" ground is not one of principle; rather, it essentially concerns the mode of proof. In the latter, death is inferred from the holding of a one-year wake. For the former, there must perhaps be more than simple certification by the parties, but there ought not be required proof of special and narrowly defined kinds of behavior to justify the ultimate conclusion.

156. 26 N.Y.2d 28, 35, 256 N.E.2d 513, 516 (1970).

157. N.Y. DOM. REL. LAW § 171(4) (McKinney Supp. 1972) makes recrimination a defense to a divorce action based on adultery. This provision was carried over from former law, but was not amended to reach the newly added causes for divorce.

158. *E.g.*, Knapp v. Knapp, 273 App. Div. 993, 78 N.Y.S.2d 729 (1st Dep't 1948).

159. While forgiveness did and still does bar a divorce action for adultery under N.Y. DOM. REL. LAW § 171(2) (McKinney Supp. 1972), this defense—like the others—was apparently not extended to new divorce grounds when the Divorce Reform Act came into effect.

Despite the general conservative tendency exemplified by *Pierone* and *Rios,* at least two approaches to redefining cruelty in view of the Reform Act's underlying policy have been articulated from time to time. One appears, somewhat tentatively, in the *Berlin* case. The court did, it has already been observed, generally hew to established lines of authority, and expressly rejected incompatibility—equated with "squabbling"—as a basis for cruelty divorce.[160] Partially in order to overcome the absence of medical testimony concerning plaintiff's condition, however, the opinion explored new territory in seeking to distinguish between injury to "health"—which it associated with prior law—and that to "well-being," the phrase used by the Reform Act:

> "Well-being" and "health" are not necessarily synonymous. Torment, humiliation and suffering detract from well-being as much as many certified diseases. Can it be seriously denied that a wife's *well-being* can be *endangered* by her husband's calculated and cruel misconduct? Is it not improper to require a woman to "cohabit" under degrading or mentally painful circumstances?[161]

Although the court did not find it necessary in the result to rely on this analysis,[162] the distinction is suggestive. It is one thing to say that the legislature has struck the social balance against relief for "squabblers" but quite another to conclude that legal cruelty lies *far* along the continuum of marital misconduct. The term "well-being" is new to statutory formulations in New York, and there is no judicial history so substantial as to import a commonly understood meaning. Surely it is arguable, therefore, that its use in the Reform Act implies adoption of a modified standard for cruel and inhuman treatment.

Unfortunately, there is nothing in *Berlin* to indicate just what the difference between "health" and "well-being" might be. It may be, from the facts involved, that the difference lies only in evidentiary requirements, although this does not seem to be the thrust of the discussion. The court seemed to have in mind, rather, a qualitative distinction, extending relief to certain forms of unhappiness that—even were they clearly proved—would not qualify as illness or injury under former law. Where "torment, humiliation, and suffering" or "degrading or mentally painful circumstances" reach the point that only

160. 64 Misc. 2d at 353, 314 N.Y.S.2d at 913.
161. *Id.* at 356, 314 N.Y.S.2d at 916.
162. *Id.* at 356-57, 314 N.Y.S.2d at 916-17.

legal bonds remain between the parties, it is "improper" to require continued marital ties, if only because society no longer requires or even thinks it desirable that great misery be tolerated indefinitely.

The *Berlin* approach is a cautiously devised one, which attempts to keep within the *Rios* doctrine but still carry out the spirit of the Reform Act by broadening the notion of "effect." It is worth noting that courts in other states have expressly recognized, as *Berlin* does tentatively, that adoption of a non-fault theory of divorce is relevant to interpretation of coexisting grounds for relief. In *Holloman v. Holloman,*[163] a New Mexico decision, plaintiff wife sought divorce because of her husband's repeated and public attention to other women. For reasons that do not appear in the opinion, she relied on cruelty rather than incompatibility in her suit, and the defendant responded that, since neither physical cruelty nor impairment of health was proved, the trial court could not as a matter of law sustain her petition. The New Mexico Supreme Court rejected this reasoning, holding actionable "any treatment of one spouse by another which is reasonably calculated to destroy the peace of mind and happiness of the injured party, and to endanger the health or wholly defeat the legitimate objects of the marriage."[164] This view, it was said, "seems preferable . . . especially in a jurisdiction such as ours, which names mere 'incompatibility' as a ground of divorce."[165]

Presumably, this interpretation is preferable precisely because, in adopting the principle of incompatibility divorce, the legislature has defined its interest in the marital relationship in terms of accomplishment of "the legitimate objects of marriage." Attention is focused directly on the circumstances of the parties seeking relief. Under traditional divorce regimes, as we have seen, principles of general deterrence carried considerable weight. The introduction of divorce for incompatibility of personality, however, implies to some degree what in juvenile court and correctional circles is called an "individualized" approach. The question is whether the relations of these particular spouses establish that their marriage is no longer viable;[166] hence, the court does not look generally to the effect on other relationships of making relief available in the case actually

163. 49 N.M. 288, 162 P.2d 782 (1945).
164. *Id.* at 291, 162 P.2d at 783.
165. *Id.*
166. *See, e.g.,* Burch v. Burch, 195 F.2d 799 (3d Cir. 1952), discussed in text accompanying note 177 *infra.*

presented. Much the same perspective was, accordingly, adopted by the New Mexico court in interpreting the cruelty provision. Once notions of general deterrence were left aside, it was appropriate to inquire whether the plaintiff, because of her husband's behavior (*i.e.*, "cruelty"), was no longer able to maintain a viable marriage relationship. If that condition is satisfied, relief will be granted without regard to other cases involving different people and different behavior that might arise in the future.

It bears emphasis that the shift of focus described above is not peculiar to the incompatibility ground; it characterizes any body of divorce law in which traditional fault notions no longer express the social interest in marital relationships. "Living apart" provisions such as those set forth in section 170 (6) of the New York Divorce Reform Act also look to permanent disruption of conjugal life as the principle governing the availability of relief,[167] and assume that the state interest properly lies in providing, rather than denying, irreconcilable parties the opportunity to establish new family relationships.[168] If any notion of deterrence exists, its effect is limited to the particular parties; once there is formally satisfactory evidence (*i.e.*, separation for a stated period of time) that these spouses are irreconcilable, the state's interest in marital stability is exhausted and relief will be granted. Correlatively, defenses associated with fault and deterrence are generally inappropriate where divorce is sought on this basis. The defense of recrimination, for example, has regularly been held inapplicable to divorce actions alleging incompatibility,[169] "marital breakdown,"[170] and "living apart."[171] Indeed, it is arguable from the foregoing anal-

167. *See* Gleason v. Gleason, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970); *accord,* Smith v. Smith, 54 R.I. 236, 172 A. 323 (1934).

168. Otis v. Bahan, 209 La. 1082, 26 So. 2d 146 (1946); Gleason v. Gleason, 26 N.Y.2d 28, 256 N.E.2d 513 (1970).

169. *E.g.,* Matysek v. Matysek, 212 Md. 44, 128 A.2d 627 (1957); Garner v. Garner, 12 N.M.S. BAR BULL. 290 (1973), *rev'g* Clark v. Clark, 54 N.M. 364, 225 P.2d 147 (1950); Smith v. Smith, 54 R.I. 236, 172 A. 323 (1934).

170. McKim v. McKim, 6 Cal. 3d 673, 678-79, 493 P.2d 888, 891, 100 Cal. Rptr. 140, 143 (1972).

171. *See* 1 H. FOSTER & D. FREED, LAW AND THE FAMILY 396 (1972). Professor Clark suggests that the applicability of traditional fault defenses in divorce actions based on living apart turns on whether the statute requires that the parties have separated "voluntarily" or "willingly." Where the parties must have agreed to live apart in order for one to sue for divorce, it is said, a notion like recrimination operates to bar a deserting spouse from seeking a divorce on this ground. H. CLARK, LAW OF DOMESTIC RELATIONS 352-53 (1968). To treat this as an example of importation of fault defenses into non-fault grounds seems unwarranted. Divorce is denied the deserting spouse simply because the ground upon which he or she seeks relief is not

ysis that traditional defenses, with the possible exception of collusion,[172] have no function in actions brought on residual "fault" grounds in jurisdictions where the principle of marital breakdown has been adopted. This argument seems to have found acceptance under the New York Divorce Reform Act which restricts the operation of recrimination, connivance and condonation to divorce actions founded on adultery.[173] These bars cannot be raised if dissolution is sought after separation for one year or if other "fault" grounds, including cruel and inhuman treatment, are pleaded.

In view of the Reform Act's redefinition of governmental interest in marriage, expressed by adoption of the "living apart" ground and by its virtual abolition of fault defenses, continued adherence to the former law of cruelty seems mechanical and ill-considered. That more could have been expected clearly appears from the *Report of the 1967 Conference of New York State Trial Judges,* held at Crotonsville shortly after the Reform Act took effect:

> With respect to grounds and defenses, the panel first discussed the importance of the new ground of cruel and inhuman treatment and considered the significance of the statutory references to conduct of the defendant which "so endangers the physical or mental well-being of the plaintiff as renders it unsafe or improper for the plaintiff to cohabit with the defendant." Over some dissent, there was a consensus that cruel and inhuman treatment approaches and perhaps indeed encompasses incompatibility as a basis for divorce. In addition, it was generally agreed that in deciding whether an allegation of cruel and inhuman treatment has been made out in a given case, an essentially subjective standard would be used and that the fact that the conciliation procedure had failed to effect a reconciliation of the parties would be a relevant consideration.[174]

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available unless certain conditions exist: among them, agreement by the parties and passage of a certain period of time. Presumably the misconduct of one spouse during the period of agreed separation would not automatically bar maintenance of the divorce action by the wrongdoer, nor would misconduct prior to separation assuming that the separation was voluntary when undertaken and consent to separation was not obtained by fraud or duress. *See id.* at 353.

172. In McKim v. McKim, 6 Cal. 3d 673, 493 P.2d 888, 100 Cal. Rptr. 140 (1972), the California Supreme Court, en banc, held that although that state's divorce reform law had eliminated both fault grounds and fault defenses in divorce actions, the principles condemning collusion in divorce cases remained in effect since the courts must still be able to satisfy themselves that the differences between the parties are irreconcilable and that marriages have broken down irremediably.

173. 1 H. FOSTER & D. FREED, *supra* note 171, at 396, 402-03, 405.

174. NEW YORK JUDICIAL CONFERENCE, THIRTEENTH ANNUAL REPORT, N.Y. LEG. DOC. No. 90, at 115 (1968). The mandatory conciliation procedure has recently been repealed, ch. 1034, § 2 [1973] Laws of New York 1888.

It may well seem odd that the members of the Judicial Conference should take a position apparently soon and squarely rejected in *Pierone, Rios,* and even *Berlin.* This curiosity may have arisen because the conferees and the courts were ostensibly using the term "incompatibility" to signify quite different ideas. New York courts, perhaps for rhetorical purposes, often use that term in what can charitably be called a popular sense. Indeed, it is sometimes difficult to tell in just what sense the word is employed. On some occasions it is expressly equated with "squabbling" and "bickering."[175] Other opinions seem to suggest that incompatibility is qualitatively different from those forms of misconduct; a commonly used formula recites that "occasional strife, lack of domestic harmony, frequent quarrels between husband and wife *and incompatibility*" furnish no grounds for relief.[176]

It is clear, however, that in those jurisdictions where incompatibility serves as more than an epithet, not every form of matrimonial unpleasantness calls for divorce. There is, rather, the recognition—much like that hinted at in *Berlin*—that many kinds of conduct can kill a marriage, and that "cruelty" in a social sense may differ markedly from its traditional legal meaning. A leading case on incompatibility describes the principle this way:

> While incompatibility of temperament in the Virgin Islands does not refer to those petty quarrels and minor bickerings which are but the evidence of frailty which all humanity is heir to, it unquestionably does refer to conflicts in personalities and dispositions so deep as to be irreconcilable and to render it impossible for the parties to continue a normal marital relationship with each other. To use the ancient Danish phrase, the disharmony of the spouses in their common life must be so deep as to be irremediable. It is the legal recognition of the proposition long established—that if the parties are so mismated that their marriage has in fact ended as the result of their hopeless disagreement and discord the courts should be empowered to terminate it as a matter of law.[177]

175. *See, e.g.,* Middleton v. Middleton, 35 App. Div. 2d 371, 316 N.Y.S.2d 583 (1st Dep't 1970) ("bickering"); Berlin v. Berlin, 64 Misc. 2d 352, 314 N.Y.S.2d 911 (Sup. Ct. 1970) ("squabblers").

176. Rios v. Rios, 34 App. Div. 2d 325, 327, 311 N.Y.S.2d 664, 665 (4th Dep't 1970), *citing* Avdoyan v. Avdoyan, 265 App. Div. 763, 40 N.Y.S.2d 665 (1st Dep't 1943), Traylor v. Traylor, 3 App. Div. 2d 727, 159 N.Y.S.2d 818 (2d Dep't 1957), which use the same language.

177. Burch v. Burch, 195 F.2d 799, 806-07 (3d Cir. 1952). *See also* Hughes v. Hughes, 363 P.2d 155 (Okla. 1961).

Once it is understood that incompatibility in its legal sense necessarily implies proof of a dead marriage, it should also be evident that the Judicial Conference's approach is entirely consistent with the Reform Act's matrimonial policy, as explained in *Gleason*. True enough, the ground of incompatibility was not adopted by the legislature; the principle underlying that ground, however, is surely approximated when cruelty is analyzed in terms of the effect of spousal behavior on the marital relationship. By way of illustration, one could—with fidelity to both the language and the policy of the Reform Act—state the issue in cruelty cases to be: Does it appear, from the evidence presented, that either spouse's behavior (whether by act or omission) has so affected the other that, subjectively viewed, it is impossible for the latter to carry on normal marital relations? When rhetoric is stripped away, it should be apparent that this standard differs in theory from the traditional incompatibility ground only in its initial focus on spousal behavior as the origin of marital breakdown. In practice, it is submitted, there is not even that significant difference, since proof of incompatibility ordinarily includes acts or omissions that allegedly have themselves destroyed or evidence destruction of the marriage. And, to make the similarity yet more explicit, it bears repeating that in New York cruelty divorces, as in incompatibility divorces elsewhere, the behavior of the plaintiff is irrelevant to the availability of relief except to the extent that such behavior tends to indicate the possibility of reconciliation.

What is not required is that one spouse has acted cruelly, in the ordinary sense of intentional or wanton infliction of suffering. It does not, however, strain either language or common experience to admit the existence of cruelty without specific and grave fault.[178] Nor does it seem that use of the phrase "cruel and inhuman treatment" by a spouse compels adherence to traditional standards. Treatment may be cruel in consequence without the offending spouse having intended to injure, and the impact of that behavior on relations between the parties cannot usefully be determined by sole reference to the quality of the act or the subjective intent of the actor. Indeed, it may be true to say that the absence of fault implicit in the incompatibility notion more clearly reflects the spirit of divorce reform than do the tradi-

178. *See* Goodhart, *Cruelty, Desertion, and Insanity in Matrimonial Law*, 79 L.Q. REV. 98 (1963).

tional standards of cruelty derived from a legal regime that made wrongdoing and innocence integral parts of every claim for relief.

C. *The Notion of Cruelty and the Divorce Reform Act: In Practice*

It was suggested early in this discussion that the Reform Act was in significant part addressed to professional as well as social evils, and particularly to then prevailing patterns of fraudulent and illegal conduct in matrimonial actions. The appropriateness of the Act as interpreted must be judged, accordingly, in light of its operation as well as in principle. In order to get some idea of the implementation of the reform law, a survey was made of all uncontested matrimonial complaints granted in Erie County between January 1 and April 30, 1973.

TABLE II

Uncontested Matrimonial Actions January 1, 1973 to April 30, 1973 in Erie County

Divorce	*No.*	*Percent*
Cruel and Inhuman Treatment	461	50.8
Abandonment	252	27.8
Confinement in Prison	1	0.1
Adultery	9	1.0
Judicial or Written Separation for one year	157	17.3
Not Stated	27	3.0
Total Divorce Decrees	907	100.0
Annulment		
Fraud	40	87.0
Other	2	4.3
Not Stated	4	8.7
Total Annulment Decrees	46	100.0
Judicial Separation		
All separation actions	8	100.0

Several conclusions are immediately apparent. Most obviously, the level of annulments has drastically declined from the time when

it closely approximated the divorce rate.[179] Divorce now accounts for almost 95 percent of all uncontested matrimonial petitions. There is surely nothing amazing in this, although the dramatic difference in the annulment rate may be surprising. Perhaps more unexpected is the distribution of divorce actions. The current paucity of adultery cases may bespeak the happy appearance of an unusual level of marital fidelity in western New York; more likely, it reflects the shifting of collaborative actions from one category to another. Considerably more important is the overwhelming popularity of the cruelty ground. This survey was taken after September 1, 1972, when the requisite period of "living apart" for consensual divorce purposes dropped from two years to one year. Despite the briefer waiting period, less than one-fifth of the divorces relied upon the device. In part, time lag may be a factor here. Even so, it is significant that in more than one-half of the 907 divorce decrees entered, cruel and inhuman treatment was alleged and proved. The hypothesis suggested at the beginning of this discussion—that much of the meaning of the Divorce Reform Act would turn on the meaning of cruelty—seems justified, at least in Erie County. Moreover, trial courts are treating the strict requirements of proof for cruelty announced in reported decisions much as they did adultery and fraud allegations prior to 1967.

It is difficult to assess the current consequences of this familiar pattern of behavior. Certainly it seems that a more or less systematic scheme of evasion still exists, and that lawyers must regularly present claims concerning both conduct and impact that are often exaggerated and sometimes simply untrue. Equally surely, judges—as before—preside over ritualistic trials, in which plaintiff and two witnesses (often relatives) testify to stereotyped forms of spousal misconduct. And, no doubt, they often continue to help inexperienced counsel go through the proper motions, in order that all required elements of cruelty are formally before the court.[180] It may be that these devices are no longer thought so obnoxious as they were before 1967; certainly public expressions of dissatisfaction are neither frequent nor vituperative. On the other hand, if O'Gorman's analysis is correct, one might reasonably expect that these forms of institutionalized deviance will in time involve some of the professional costs that were associated with practice under the old law.

179. For statewide statistics, see text accompanying notes 37 & 38 *supra*.

180. That this charitable practice is still followed is based on anecdotal, but highly credible, evidence.

There is, as well, cause for concern that undesirable social consequences will result. In significant degree, one body of law applies to uncontested cases and quite another to those involving overt dispute. The opportunity for economic blackmail exists as surely under this regime as it did before. In view of the strict law of cruelty that controls contested matters, one spouse has the power effectively to deny the other access to relaxed standards simply by refusing to enter into a separation agreement and threatening to challenge any allegations of cruelty. The premium thereby placed on cooperation may easily be translated into the language of high (or low) finance. Moreover, to the undetermined extent that the known existence of inconsistent rules and practice detracts from public respect for legal institutions, there is further cause for concern.

It remains to be asked whether formal adoption of incompatibility or any other notion of cruelty would avoid these consequences. Indeed, the former has been criticized precisely on the ground of implementation. Incompatibility contains no clear definition of offensive conduct, nor has it an objective test for effect of the kind provided, for example, by a living apart condition.[181] At the trial court level, therefore, divorces may routinely be granted without adequate assurance that irreparable disruption has occurred. There is, of course, no sure way of knowing whether adoption of incompatibility would result in greater or lesser disparity between formal policy and law in action. This much might, however, be said: It may now be true that, whatever appellate courts say, trial judges grant relief in circumstances similar to those discussed in *Berlin* and contemplated by the doctrine of incompatibility. While written opinions have almost unanimously scorned the "cult of the dead marriage,"[182] many of its adherents now appear before and sit on the bench. It might, therefore, reasonably be hoped that acceptance of a standard substantively related to obviously pressing social needs will allow, if anything, surer control over the administration of matrimonial law.

CONCLUSION

It was suggested at the outset that much of the significance of divorce reform in New York would turn on the extent to which the

181. *See* McCurdy, *Divorce—A Suggested Approach with Particular Reference to Dissolution for Living Separate and Apart*, 9 VAND. L. REV. 685, 700-01 (1956).

182. Middleton v. Middleton, 35 App. Div. 2d 371, 373, 316 N.Y.S.2d 583, 584 (1st Dep't 1970).

cruelty ground appropriately located the point of accommodation between concern for marital institutions and irresistible demands for relief when conditions became intolerable. The experience in Erie County indicates both the accuracy of that suggestion and the probability that reliance on previous definitions of cruel and inhuman treatment does not strike the required balance either in principle or in practice. The Divorce Reform Act is substantially hobbled by chains forged long ago and in the service of a rejected social policy. There is, indeed, a *deja vu* quality about this development; it faithfully copies, but with even less justification, the analytical process begun almost two centuries ago when courts first looked to the jurisprudence of divorce *a mensa et thoro* in construing dissolution statutes. It is regrettable that, in this instance, reference to past experience has provided little more than a model by which ancient errors may conveniently be repeated.